Nos. 77-1499, 77-1500, 77-1501, 77-1502 and 77-1504

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANK P. NORTH, JR., *Petitioner,*

vs.

UNITED STATES OF AMERICA,

JACK E. WALKER, *Petitioner,*

vs.

UNITED STATES OF AMERICA,

PETER V. PAPPAS, *Petitioner,*

vs.

UNITED STATES OF AMERICA,

ROBERT CRAIG, *Petitioner,*

vs.

UNITED STATES OF AMERICA,

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS PAPPAS AND CRAIG TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

Petitioner Peter V. Pappas, and Petitioner Robert Craig, Defendants-Appellants in the Court below, submit this Re-

ply Brief to the Brief of the United States in Opposition to the Petitions For Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.*

OPINIONS BELOW

The Opinions of the Seventh Circuit, and other lower court Orders and Opinions are not yet reported, but are printed in the Joint Appendix filed by the Petitioners.

JURISDICTION

The decision of the Court of Appeals for the Seventh Circuit was filed December 12th, 1977, and is set forth in the Joint Appendix (App. D, pp. 59-151) The Motion for Re-Hearing En Banc was filed December 27th, 1977, and ultimately denied on March 21st, 1977. (App. E, p. 152) This Petition is filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1524 (1).

Jurisdiction as to *Craig and Markert* v. *United States*, 77-1504, is similarly invoked under 28 U.S.A. 1524(1), and is likewise pending before this Court.

The Government Brief In Opposition was filed June 12th, 1978, and Petitioners' Reply thereto is filed instanter.

QUESTIONS PRESENTED FOR REVIEW

Petitioner Pappas submitted Questions for Review in Petition 77-1501.

Petitioner Craig submitted Questions for Review in Petition 77-1502, and in companion Petition 77-1504.

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* Also affected by this Reply Brief, is *Markert and Craig* v. *United States*, 77-1504, cert. pending.

Both Petitioners adopted other Questions submitted by Petitioner North's 77-1499, and by Petitioner Walker's 77-1500.

The Government Brief has restated those questions but in a more generalized and capsulized version.

The Petitioners incorporate by reference, their original Questions as presented by all Petitioners in the original Petitions (77-1499, 77-1500, 77-1501, 77-1502 and 77-1504).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 12, Illinois State Constitution of 1970; Smith-Hurd Illinois Annotated Statutes.

> ". . . A member (of the General Assembly) shall not be held to answer before any other tribunals for any speech or debate, written or oral, in either house. These immunities shall apply to committee and legislative commission proceedings."

Constitution of the United States, Amendment IV:

> The right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

Constitution of the United States, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Constitution of the United States, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States,

are reserved to the States respectively, or to the people.

Title 18, United States Code, Section 1951

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point

outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793.

Title 18, *United States Code, Section* 1341

§ 1341 Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91-375 § 6(j) (11), 84 Stat. 778.

Rule 501, *Federal Rules of Evidence*

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to

statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933.

Rule 1101(*b*) *&* (*c*), *Federal Rules of Evidence*

Rule 1101. Applicability of Rules

* * *

(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the Bankruptcy Act.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

STATEMENT

A. Statement of the Case.

Petitioners Pappas and Craig,[1] have related how this Case reached this Court, from the Trial Court and the Seventh Circuit below.

The Government likewise has so advised the Court, and there is no variance in those respective statements.[2]

[1] Pappas Pet. 77-1501, pp. 4-6. Craig Pet. 77-1501, pp. 9-12 and 77-1504.

[2] Gov. Br., p. 3.

B. Evidentiary Statements.

Petitioner Pappas set forth only evidence relating to the Tapes of "Consensual" Conversations, at various and appropriate places in his Petition, 77-1501.

Petitioner Craig set forth *Facts* relevant to this Petition, as to the Mailings, the Travel Counts, and the Electronic Recordings.[3]

The Government found no objections in Petitioners' review of the evidence, but in its brief, the Government has given its version of the evidence.[4] Their version does not cite supporting references to the Record, as was done by the Pappas and Craig statements. Petitioners further note misstatements by the Government's version. Since this Petition poses legal issues, the Court should not now be burdened with unravelling the Government's new version.

Petitioners respectfully rest with the evidentiary statements they have submitted.

PETITIONERS REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

Petitioners Pappas and Craig, in their Reply to the Government's Brief, refer directly to their own Questions and to their own Reasons, citing the same numbers thereof as in their Petitions, but cross-reference the same with the Government's arguments.

1. The "Legislative" Documents and "Legislative" Evidence were not admissible.[5]

The respondent misapprehends. Petitioner Markert has, in the past, questioned the intent of Congress relative to

[3] Craig Pet. 77-1502, pp. 12-15.

[4] Gov. Br. pp. 4-9.

[5] Pappas Pet. 77-1501, p. 8. Craig Pet. 77-1502, p. 18, and Pet. 77-1504, pp. 14-27.

employing criminal statutes of general application to State legislators—if a state legislative immunity or privilege is recognized. But—with the evolution of time and the devolution, by the government, of this important question to an evidentiary question, and the acquiescence of even the favorable courts therein, the question has resolved itself to a single inquiry of whether such a privilege exists in the common law, giving state legislators the same protection that surrounds our United States Representatives. We ask no more than was given in *Gravel* (*Gravel* v. *United States*, 408 U.S. 606).

Therefore, the Solicitor errs when he begins his resistance by a contention that we argue for immunity from prosecution (See Solicitor's Opposition, p. 5).

We ask a more singular question, and, the question is whether the common law legislative privilege exists and is mandated by Rule 501, Federal Rules of Evidence. An even more basic, but relevant question is whether this is a federalistic, or nationalistic, form of government. If it is the latter, the demise of the States is forseeable.

The Solicitor demeans the conflict existing between this and the Third Circuit, espousing the analysis of the dissent[6] that the Third Circuit was speaking in *dictum*.[7]

This is pure sophistry. The Third Circuit expressly denounced the reasoning of the Seventh Circuit.

The question is recognized and unresolved. Its impact is widespread and growing, not only in criminal proceed-

[6] Judge Gibbons, *In Re Grand Jury Proceedings* 563 F. 2d 577, at 585.

[7] We hear no recognition of the three judges who dissented in the Seventh Circuit.

ings by indictment, but by Grand Jury inquiry. We submit it is ripe for resolution.

The Third Circuit opinion was never appealed and still stands, and in that case, the Court affirmed the trial court suppression of certain "legislative actions", and further supported the common law privilege of immunity for state legislators as applicable in federal criminal proceedings, (563 F.2d at 583) and that this ". . . privilege is not one of nondisclosure but of nonevidentiary use." (563 F.2d at 584)[8]

Petitioners have pointed to the conflict in this area between the Circuits—between the Third and the Fifth on one hand, and the Seventh on the other. This conflict should now be resolved by this Court as to this important and viable question affecting federal-state relationships.

2. There was an over-extension of Federal Jurisdiction in this Case.[9]

A. Mail Fraud Counts. (18 USC 1341)

The Government opposes the Petition, but ignores the Record and Petitioners' arguments.

Neither Petitioner Craig, nor Petitioner Pappas placed any document in the mail, nor received any document in the mail. Moreover, as to Petitioner Pappas, Count 2 of

[8] In *DiCarlo* v. *United States*, 77-990, in opposition, the Solicitor argued (p. 13) that the Government "did not seek rehearing en banc because the judgment was favorable." The panel decision in *Markert* (528 F.2d 733 and Joint App. 21-43) was also favorable to the Government, also finding waiver, but the Government enthusiastically sought re-hearing en banc and got it. The vagrant ideologies conflict.

[9] Question #1 from 77-1501, p. 8-12, and Questions #s 1 and 2, Walker 77-1500, and Questions #s 3 and 4, Craig 77-1502.

the Indictment (R. 1) did not name him as a "co-schemer", and the Government has insisted that all the mailings in this case were ". . . either placed in the mail by a co-schemer, or mailed to a co-schemer or both."[10]

If Petitioners are to be charged with abuse of the Mails, then some other basis must be shown to invoke federal jurisdiction.

This Court has held that the mails must be used ". . . as a central necessary instrumentality in the perpetration . . ." of the scheme, and must play in indispensable role. *United States* v. *Maze*, 414 U.S. at 408-9. Though the Solicitor concedes that the mailings must be ". . . for the purpose of executing the scheme",[11] he argues that ". . . it is not necessary that the scheme specifically contemplate the use of the mails; it is sufficient if the mailings were *incident to an essential part of the scheme*". (emphasis added.)[12]

Judge Swygert, in dissenting below, succinctly stated:

> "This test standing alone, is wholly insufficient. It leaves out the necessary causal relation. Any mailing can be incidental to the scheme; yet it may not further its execution . . . The mailing must be essential to the execution or furtherance of the scheme."[13], and ". . . the record is completely bare of evidence that any of the defendants or their co-schemers contemplated, agreed or intended to use the mails to further the execution of their scheme to defraud the citizens of Illinois."[14]

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[10] Gov. Br. to the 7th Circ., pp. 77-8.

[11] Gov. Br. p. 11.

[12] Gov. Br. p. 11.

[13] Joint App. D, p. 131.

[14] Joint App. D, p. 142.

B. The Travel Count (18 U.S.C. 1952)

Petitioners argued that this interstate trip by Lauwereins was fortuitous, unforeseen, not contemplated by anyone else other than Lauwereins, that it was neither essential nor necessary for the purposes of the alleged scheme to raise the $50,000 fund, and that Lauwereins made this trip on his own, for some undisclosed purpose of his own.[15]

In *Opposition*, the Government asserts improperly, that:

> "Indeed the trip was viewed by the conspirators as an 'important episode' in the fund raising campaign. *Ibid*", referring to Joint Appendix pp. 111-112, a portion of the majority below; and "Here, the interstate travel was both planned and undertaken to achieve an essential step in the fraudulent scheme".[16]

The Record in this case refutes the Government stand, since it is clear from the Evidence, that:

1. There was *no* evidence that Lauwereins was directed by *anyone else* to make this trip.
2. There was *no* evidence that Lauwereins reported to *anyone else* before or after he made that trip.
3. None of his Chicagoland co-conspirators or cohorts ever knew about the trip.
4. The $50,000 fund was raised entirely from Chicago area ready-mix executives, and their formula never contemplated application to the down-state group. ($40 per Chicagoland ready-mix truck).

This one trip was so minimal, incidental, fortuitous and peripheral, that it was error to submit the Travel Counts to the jury. *United States* v. *Isaacs*, 493 F. 2d 1124(7th C.), cert. denied, 417 U.S. 976 (1974).

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[15] Pet. 77-1501, p. 10-12. Craig Pet. 77-1502, p. 15.

[16] Gov. Br. at p. 14.

3. The Tapes of the "Consensual" Conversations Were Inadmissible.[17]

The Government does not object to the evidentiary statements of the Petitioners. In opposition, the Government generally relies upon the majority below, and fails to overcome Petitioners' various grounds for suppressing these tapes.

A. The Original Tapes and Reels Were Not Marked.

The Government concedes this.

B. The Original Tapes were Never Under "Seal" and Secured.

The Government concedes this, but contends that there was no statutory ". . . error in the failure to present the tapes to the district court for sealing".[18]

This begs the question, this lack of "seals", the lack of markings, and the lack of any "chain of custody" linking the original tapes to the tapes presented in Court, certainly supports inadmissibility.

C. The "Chain of Custody" of the Original Tapes Was Never Established, and There Was No Direct or Even Indirect Link Between the Original Tapes Released by Pete Pappas to D'Hooge and those "O" Tapes Presented in Court.[19]

The Government concedes that a "chain of custody" was never established but urges that the tapes presented in Court were in the same condition as when received by the

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[17] Pappas Pet. 77-1501, pp. 12-36; Craig Pet. 77-1502, pp. 18-20; Walker Pet. 77-1500, pp. 17-18.

[18] Gov. Br. p. 19, citing 18 U.S.C. 2518 (a)(3).

[19] Pet. 77-1501, at pp. 19-23.

Government. They cite the Pete Pappas testimony that ". . . the tapes accurately reflected such conversations."[20]

Pete Pappas however, listened in 1976, to *copies* of the "O" tapes, purportedly made in 1973, and his testimony did not link the *copies* he heard, to the original tapes.[21]

Then the Government cites the testimony of Professor Wells, that the "O" series he had examined, ". . . had not been altered".[22] This conveniently ignores Weiss' further testimony that he, Weiss, did not know whether he had examined the *original* tapes—or mere *copies*, and he conceded that if he had in fact examined only *copies*, that he could not state or determine whether the *originals* had or had not been tampered with.[23]

The Government has failed to connect or link the tapes presented in Court in 1976, with those made in 1973, and further failed to prove that the *originals* had not been tampered with. Nor is there yet, proof that the originals were ever presented in court.

E. The Electronic Surveillances in This Case Were an Abuse of or Were an Unreasonable Search or Seizure, And a Violation of the Fourth Amendment.[24]

1. In Opposition, the Government argues that the Petitioners have no legitimate 4th Amendment interest,[25] and

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[20] Gov. Br. p. 8.

[21] Pappas Pet. 77-1501, pp. 19-22, that either D'Hooge or his attorney Winstein had the original tapes.

[22] Gov. Br. pp. 18-19.

[23] Trans. pp. 1198-2020.

[24] Pappas Pet. 77-1501, pp. 23-27; Walker Pet. 77-1500, pp. 17-18. Craig adopted this argument and reason.

[25] Gov. Br. at pp. 19-20.

assert that they are not afforded any such protection because as "wrongdoers"—they had a ". . . misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." citing *Hoffa* and *White*.[26]

Neither *Hoffa* nor *White* as cited, apply here. In *Hoffa*, Partin overheard Hoffa's words, and he related them in court. In *White*, Jackson overheard White's words and he related them in court. Moreover, there were no tapes played in either case.

Here, Pete Pappas did *not* relate the conversations in court. Rather, the tapes were played instead. Nor did the tapes *corroborate*, and thus they did not come under *Lopez*.[27]

2. The Government ignored the conflict in *White*, as noted by this Petitioner.[28] Is *On Lee* viable? Or, was it too overturned by *Katz*?

In *White*, the majority held that *Katz* could not be applied retroactively. One plurality then urged that *On Lee* was viable, whereas another plurality contended that *Katz* effectively overruled *On Lee*, just as it had specifically overruled *Olmstead* and *Goldman*.[29]

[26] *Hoffa* v. *United States*, 385 U.S. 293, 302; *United States* v. *White*, 401 U.S. 745, 749.

[27] *Lopez* v. *United States*, 373 U.S. 427 (1963).

[28] Pappas Pet. 77-1501, pp. 26-27.

[29] *United States* v. *White*, 401 U.S. 745 (1971); *On Lee* v. *United States*, 343 U.S. 747 (1952); *Katz* v. *United States*, 389 U.S. 347 (1967); *Olmstead* v. *United States*, 277 U.S. 438 (1927); *Goldman* v. *United States*, 316 U.S. 129 (1942).

This Court now has the opportunity to resolve this issue, and we submit that this Court's rulings in *Katz* supersede *On Lee*.

F. These Interceptions Were Not "Consensual" Because Pete Pappas Did not Give, in Advance, His "Prior Consent".[30]

The Government misstates in a footnote the effect of *Bynum* and *Smith* v. *Wunker*[31]—by suggesting that those two cases *merely* hold that there was no "interception" within 18 U S C 2511(2)(c).

That footnote tells only half the story—since it held that because there was no "prior consent", there was no "interception", and that the tapes were *not admissible*.[32]

Here, Pete Pappas gave his "consent" *only* subsequently. Under those two cases, the tapes here are likewise inadmissible.

G. These "Interceptions" Were Not Made "Under Color of Law".[33]

1. The Government misconstrues the Statute and misstates the contentions of the Petitioners.[34]

The Statute is clear—before "prior consent" can invoke

[30] Pappas Pet. 77-1501, pp. 27-29.

[31] Gov. Br. p. 17, fn 10.

[32] *United States* v. *Bynum*, 360 F. Supp. 400 (S.D. N.Y.), aff'd, 485 F. 2d 490 (C.A. 2nd); vacated on other grounds, 417 U.S. 903; *Smith* v. *Wunker*, 356 F. Supp. 44 (S.D. Ohio); and see Pappas Pet. 77-1501, pp. 27-29.

[33] Pappas Pet. 77-1501, pp. 30-33; Craig Pet. 77-1401, pp. 18-20.

[34] Gov. Br. p. 16.

the statutory exemption, the person granting that consent in advance, must also be "acting under color of law".[35]

Petitioners so contended in the Petitions.

2. The Government attempts to meet its burden of invoking the statute with its assertions that:

> ". . . Rep. Pappas was clearly cooperating with the government . . .", and ". . . a government agent (D'Hooge) set up the recording equipment . . . operated the equipment, and took custody of the tapes thereafter."[36]

"Co-operation" alone does not create "color of law". Adding the ingredient of use of government equipment and tapes and the technical assistance of an agent (D'Hooge) does not create "color of law". Pete Pappas remained a private person who taped only to protect *himself* from any charge of obstruction of justice[37] and, retained control over the *use* of the tapes until a later date, *after* he consummated his plea deal assuring him of favorable treatment of his criminality.[38]

3. The Government seeks to avoid the stringent requirements of 18 U S C 2511(2)(c), by now asserting, that "acting under color of law" is *not* required under 18 U S C 2511(2)(d),[39] that the tapes are thus admissible.

[35] 18 U.S.C. 2511(2)(c) reads as follows:
"It shall not be unlawful under this chapter for a person *acting under color of law* to *intercept* a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given *prior consent* to such interception." (emphasis added)

[36] Gov. Br. pp. 16-17. D'Hooge did take control of those original tapes, and the Record discloses that they were never seen again. Pappas Pet. 77-1501, pp. 19-21.

[37] Trans. pp. 62-4, Motions To Suppress.

[38] Trans. pp. 62-4, 95,331; R. 107, p. 6; Pappas Pet. 77-1504, pp. 19-21, 27-29.

The Government never made that assertion at the trial, and there relied entirely and only upon 18 U S C 2511(2)(c). Thus, this position is inappropriate now.

4. The Tapes Should Be Suppressed Because the Record Does Not Disclose Compliance by Government Attorneys With the Guidelines of the Attorney General Governing "Interceptions" Or The "Monitoring" of "Consensual" Conversations.[40]

The Government's contention of "waiver" ignores the inappropriate actions of the government attorneys during the trial, which in effect now estops the Government.

A Motion to Suppress was heard at the inception of this trial relative to the "consensual" overhearings. Then United States Attorney Samuel K. Skinner testified that he had not himself made any written request to his superiors (The Department of Justice) for authority to make the tapes (Tr. 473), but had enlisted a certain D'Hooge, a Postal Inspector, and that Postal Inspectors had followed the (postal) regulations concerning "consensual" tapings. (Tr. 453, 468, 472, 473) Petitioner Pappas, through his attorney, asked whether he might see the Postal Inspectors' "reports". The government trial attorney resisted on the ground that they were not "discoverable". The inquiry was not further pressed. "Non-discoverable" in the context in which it was used implied non-availability.

[39] Gov. Br. p. 17, fn 10.

[40] Pappas Pet. 77-1501, pp. 36-39. The question of exercise of this supervisory power is now before this Court in *United States* v. *Caceres*, 76-1309, cert. granted June 5th, 1978 to 545 F. 2d 1182 (9th C. Cal.) (1977).

In February, 1978, after the panel opinion in this cause was rendered, the petitioners herein asked for a rehearing to determine if in fact, the Guidelines of the Attorney General had been complied with. Petitioners learned, through the Freedom of Information Act, that Guidelines had been drawn by the Attorney General of the United States. It was at this time, that it was determined that the person in charge of the investigation, to wit, the Department of Justice, was required to get authorization, not the Postal Department, nor the Postal Service.[41] We now know that has not happened. We have also been advised through the Freedom of Information Act that Agent D'Hooge, whom the United States Attorney relied upon for compliance, was not even in fact a Postal employee, but rather was an Internal Revenue Agent.[42]

On Petition for Rehearing or Rehearing En Banc, the government protested that, in believing the testimony of the United States Attorney, rather than pursuing the matter further, the defendant had waived. In other words, the petitioners were obliged to *presume* that the United States Attorney lied; that Postal authority was not sufficient; that Agent D'Hooge, presented as a Postal Inspector, was in fact an inspector from another agency. The Petitioners onus was to disbelieve everything that was uttered by an attorney for the United States, an attorney and officer of the United States District Court, the representation for Agent D'Hooge that he was employed by the Postal Service, not the Internal Revenue Service.

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[41] The Guidelines are in Appendix G as implemented by Appendix H. Pappas Pet. 77-1504, App. 1-4. The U. S. Attorney at Chicago headed this investigation. (Trans. p. 473).

[42] The Record does not disclose effect of the Guidelines upon D'Hooge as an employee of the Internal Revenue Service, nor compliance by the Internal Revenue Service.

Though judicial proceedings are conducted generally on mutual respect for the representations of counsel—it is the present argument of the Solicitor that representations of the trial attorney for the United States must be deemed suspect, and the plumbing of those suspected untruths devolve upon defense counsel opposing the government, and that their failure to probe deeply to unearth the truth underlying government false representations results in *waiver*. Yet, the Solicitor's next argument will be an urging to rely upon official regularity. We do not contemplate that this or any other Court will accept such contentions.

We submit that any misrepresentation by any attorney, upon which his opposition relied, would call for the most severe sanction. We submit further that the United States Attorney for the Northern District of Illinois testified under a misapprehension not only of his own duties but of the capacity of the persons assisting him. The alternative is obstruction of justice—a felony. It is our expectation that the Solicitor General does not embrace the latter alternative.

5. The Erroneous Consolidation of the Mail Fraud Indictment with the Perjury Indictment Was Improper.

Petitioners urge this Court to exercise its supervisory powers to reverse the Trial Court's improper consolidation and joinder.[43]

The Government contends that:

> "Even if the joinder were improper as to Course, it is difficult to understand how the co-defendants could have been prejudiced, particularly when the trial court instructed the jury that the evidence as to Course's alleged perjury did not have any applicability to the other defendants."[44]

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[43] Pappas Pet. 77-1501, pp. 39-42.

[44] Gov. Br. p. 24.

It is clear, that Course's testimony was tainted because the petit Jury knew that Course had lied to the Grand Jury. That testimony in turn tainted the defense of the other defendants as well as Course—that there had not been any bribery—that only campaign funds were involved.

It is naive to assume that the prejudicial effects of that known perjury would be overcome by any charge to the petit jury. We noted Judge Learned Hand's admonition that this posed a psychological feat beyond the powers of the jury.[45]

CONCLUSION

Wherefore, for the reasons stated in the Petitions and in the Reply Brief submitted here, the Petitioners respectfully pray that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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[45] Pappas Pet. 77-1501, p. 42. citing *Nash* v. *United States*, 54 F. 2d 1006, 1007, 352 U.S. at 247 and p. 39, citing *United States* v. *Jacobs, cert. granted*, 77-1913 where this same question is on review.

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